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Final Paper: Kyoto Protocol Story and Reflection

In this final paper, I aim to demonstrate a more comprehensive (if not complete) understanding of the distinction between operative, legally binding texts and the interpretations, institutional evaluations, and political perspectives that respond to them. To support this, I will frame the story of Kyoto through two overlapping narrative lenses: first, the governance and organizational dimension, and second, the political negotiation dynamics.¹ These sections will be primarily descriptive, drawing heavily on lived accounts from civil society, government, academia, and other COP participants as reflected in sources such as the Earth Negotiations Bulletin and legal commentary.²

There is also an incredibly extensive body of literature examining better ways to address the problem of climate change and GHG emissions. This literature spans countless disciplines, as indicated by the IPCC's Sixth Assessment Report.³ Considering this, my reflection on this question will be somewhat more focused, tied to current perceptions of transnational climate change coordination and environmental law principles through the lens of the story of the Kyoto Protocol.

Story of the Kyoto Protocol

As you have guided, the Kyoto Protocol is not an isolated story. It is somewhat easier to detach it now than say five years ago, with a beginning and end - "Although its second commitment period came to an end on 31 December 2020, and it has, to all practical intents and purposes, now expired, the Kyoto Protocol remains a key milestone in the evolutionary development of the international climate change regime."⁴

Still, the Kyoto Protocol can only be detached from the current UN climate regime to the extent that one considers it a step in the path with a conclusion in the Paris Agreement.⁵ I believe this means I should specify and argue my choice of time range for any story of the Kyoto Protocol. Most of my focus for the "story" of the Kyoto Protocol will be between the years of 1995 and 2005. Apart from the appeal and neatness of a clear decade, this time also concisely includes the negotiations of the original Kyoto Protocol up until its entry into force. This spans COP-1, starting March 28, 1995, to COP-11 and the first Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, which ended on December 10, 2005.⁶

Different literature breaks the time into different categories, based on when they were written, what the author(s) were writing about, and how the author(s) felt about the state of international negotiations. For my timeline and purposes, I will go to periods categorized by Joanna Depledge in her 2005 *The organization of global negotiations: Constructing the climate change regime*.⁷

Kyoto Protocol negotiations started with the establishment of the Berlin Mandate at COP 1 in 1995, with the adoption of the Kyoto Protocol two years later in 1997.⁸ The protocol left much to be negotiated on the actual mechanics of its goals.⁹ The Buenos Aires Plan of Action at COP 4 established to what extent the parties would negotiate on plans for the Protocol's eventual entry into force.¹⁰ The Bush administration would take office the next year and reject the Protocol, which would heavily influence the negotiations of the Marrakesh Accords at COP 7.¹¹ It also influenced following negotiations to encourage countries to ratify, namely Russia.¹² This involved the EU dropping objections to Russia joining the WTO and the eagerness of Russian industry to capitalize on hot air credits.¹³

Though unclear on specifics, the Kyoto Protocol was not the result of a lack of strategy of the UNFCCC or international governance. In fact, eventual agreement and entry into force were “arguably only possible based on the broad political agreements reached in Kyoto.”¹⁴ That is not to say future negotiations were *not* political.¹⁵

Environmental Principles and Success

Considering better ways to reduce greenhouse gas emissions raises key questions: Is the Paris Agreement more effective than the Kyoto Protocol in this regard? And, does international environmental law offer an even better approach, treaty-based or otherwise?¹⁶ In my view, both the Kyoto Protocol and the Paris Agreement are successes, primarily because they are adopted and existing international treaties. While they might have pursued more mandatory goals, doing so could have jeopardized their adoption.¹⁷

This perspective leads to an examination of crucial legal concepts: hard versus soft law, the nuances between “binding” and “mandatory” law, and the application of international principles. Specifically, I will discuss Common But Differentiated Responsibilities (CBDR) and the hard, customary law principle of sovereignty.¹⁸

International environmental law (IEL) norms existed in a different context during the Kyoto Protocol negotiations than they do today. This evolution, driven partly by treaties like the Kyoto Protocol and the Paris Agreement and their role in the “crystallization of principles in international law,” is reflected in what Rajamani & Peel describe as “evidence of increasing maturity in the content of IEL, both customary and treaty law.” This maturity includes how “Customary IEL has come to be seen as comprising the harm prevention principle and three related duties: the duty of due diligence and the procedural duties to conduct an EIA and to cooperate in good faith, including through notification and consultation”¹⁹

CBDR is typically “soft law” in general international law, but it becomes a “legally binding principle” within the climate change regime. In general international law, CBDR “is most likely to qualify as a principle of international environmental policy or soft law...” However, regarding the climate regime, “The UNFCCC and the Paris Agreement are the exceptions... [where] the concept of common but differentiated responsibilities qualifies as a legally binding principle given its explicit inclusion in both instruments.”²⁰

IEL includes general principles such as prevention, precaution, sustainable development, and CBDR, but determining their exact reach is a matter of great debate. For example, regarding their legal status, it’s “unclear whether these principles are part of international law and, if so, what their precise legal status is,” with possibilities including customary law (like prevention), “general principles” under the ICJ Statute, or “soft law.”²¹ But while the legal reach and substantive content of principles such as CBDR are highly contested, their operational significance is not.²²

This evolution of IEL norms is happening alongside a growing central tension in IEL, international law overall, and climate change. While many scholars view traditional sovereignty as a blockage, critiquing the “absolute conception of sovereignty” as an “old concept” and calling for “a united sovereignty,” recent instruments exhibit “greater deference to national sovereignty.”²³ This deference reflects, “the realities of the multilateral system, where many large and powerful countries guard their sovereignty jealously, and eschew any hint that a UN body might influence their domestic policymaking or enforce rules.”²⁴ This “greater deference” is identified as a general trend in IEL by Rajamani and Peel, and explains why Bodansky and van Asselt make a point to “outline an alternative” to IEL that “accepts

state sovereignty as a given" in the Second Edition of *Art and Craft of International Environmental Law*.²⁵

A comparison with the UN Convention on the Law of the Sea (UNCLOS) highlights different developmental paths for major environmental treaties. In early climate change negotiations, some envisioned a general "law of the atmosphere" modeled on UNCLOS, an approach later adopted for the Convention on Biological Diversity.²⁶ However, for climate change, "the urgency of the issue led states to adopt a more focused approach," - resulting in the UNFCCC. Despite differing origins, both treaties achieved foundational status: UNCLOS was notably described by Tommy Koh as "a constitution for the oceans," and similarly, in the climate sphere, "states have given priority to the UN Framework Convention on Climate Change."²⁷ More recently, the dynamic interplay between these regimes has been demonstrated, as a recent ITLOS Advisory Opinion interpreted obligations under UNCLOS "by reference, inter alia, to relevant 'external rules', in particular the Paris Agreement's temperature goal and timeline for emissions pathways."²⁸ This opinion also drew on "best available science" to establish a "stringent" standard for due diligence concerning marine pollution from anthropogenic GHGs. This approach follows from arguments presented to the International Tribunal for the Law of the Sea, for instance, by the IUCN in its statement for Case No. 31, which contended: "Thus, the due diligence obligation placed upon the Convention's States Parties must be understood with reference to the UNFCCC framework, including the Paris Agreement and the temperature and net-zero and net-negative goals enshrined therein, as well as the present scientific understanding of the issue of climate change, which clearly indicates that warming beyond 1.5°C would result in dangerous anthropogenic interference with the climate system."²⁹

Understanding "hard" and "soft" law within the UN climate regime presents further terminological challenges, especially when analyzing treaties like the Paris Agreement. A treaty is hard law in its binding legal form, yet provisions within it can vary significantly in their legal character.

One source of confusion is the term "soft law" itself. Bodansky and van Asselt note, "'soft law' can create confusion because it is sometimes used to refer to several different features of norms: their legal vs. nonlegal character, their precision, their mandatory vs. hortatory language, and their implementation mechanisms..." They clarify they use "'soft law'... only to refer to nonlegal norms," distinguishing these from aspects like precision or mandatory quality within legal instruments.³⁰

A crucial distinction they make is between "binding" and "mandatory." They state, "We use the term 'mandatory' rather than 'binding' to refer to this dimension of norms because the term 'binding' is ambiguous." "Binding" is sometimes used for a norm's formal source (e.g., treaties are binding) and other times for what they term "mandatory" (directive strength). Thus, when "writers characterize a treaty norm as nonbinding... what these writers mean is that the provision is nonmandatory." For example, Bodansky noted that within the UNFCCC, a "'legally binding'" treaty, "Article 4.2 was formulated as a non-binding aim rather than as a legal obligation", meaning it was a non-mandatory provision.³¹ This aligns with his view that "legal bindingness reflects a state of mind" of officials and the broader community, and he tends to avoid hard/soft law distinctions.³² Rajamani, similarly, tends to use "bindingness" for legal forms and "obligations" for the character of provisions.³³

This would not necessarily be relevant for hard or soft law distinctions if it were not for legalization theory, which is also used to analyze international environmental law. Pickering et al. explain, "According to legalisation theory, international norms that may otherwise be considered hard law owing to their formal legal status... (such as promises made in treaties...) can still be viewed as soft law, or of having soft legal character, if they are imprecise or lack mechanisms for delegating..."³⁴

This equation of "soft law" with "soft legal character" for treaty provisions can be confusing. A more mainstream characterization of soft law instruments, as noted from Rajamani and Peel, "takes the form not just of resolutions and declarations, but also decisions taken by conferences of parties (COPs) to MEAs," and "plays a central role in the day-to-day functioning of IEL."³⁵ In fact, the soft law nature of COP decisions is a ground for debate on a more effective climate change regime.³⁶

Rajamani and Bodansky refer to hard and soft approaches in a different context (sanctions vs facilitative) in their joint paper on the history of the climate change regime.³⁷ The divergent uses are evident in scholarly titles like Rajamani's "Interplay Between Hard, Soft and Non-Obligations" versus Pickering et al.'s "Global Climate Governance Between Hard and Soft Law," both analyzing Paris provisions. The critical takeaway is that treaties like the Paris Agreement are "hard law" in form but utilize a spectrum of provisions. These range from highly mandatory to non-mandatory, with varying precision and often relying on facilitative rather than enforcement-heavy mechanisms (low delegation). Recognizing these distinctions and the specific terminology authors employ is essential for accurately assessing the legal nature of international climate agreements.³⁸

What purpose does this overview serve for a paper on the Kyoto Protocol? The Kyoto Protocol is often seen as "hard" compared to the "soft" Paris Agreement.³⁹ Therefore, it is necessary to point out a possible point of confusion with terminology, especially considering the mainstream nature of the UNFCCC.⁴⁰ It is especially important considering the criticisms and debate around IEL principles and their use in practice in the climate change regime.

When assessing the Kyoto Protocol's success, we can apply Bodansky's "report card" for the UN climate change regime (post-Glasgow) to just the Kyoto Protocol, which evaluates five elements: "(i) Shaping normative expectations. (ii) Creating political moments. (iii) Increasing ambition. (iv) Providing financial support. (v) Reducing emissions, which of course is the bottom line."⁴¹ Applying such a framework to the Kyoto Protocol reveals a nuanced legacy - it certainly excelled at "Shaping normative expectations" with its binding targets for developed countries and certainly succeeded in "Creating political moments" through its negotiation and entry into force. "Increasing ambition" over time was built into the mechanics, but participation in the second commitment period was limited.⁴² The UNFCCC looked at the GEF as an interim while also seeking control over it.⁴³ The Adaptation Fund is now formally serving the Paris Agreement, but has largely relied on voluntary contributions since the drop of the carbon market in 2012.⁴⁴ I agree with the IPCC Sixth Assessment Report Chapter 14's headline argument that "The Kyoto Protocol led to measurable and substantial avoided emissions..."⁴⁵

This raises a more pointed question: not whether history could have unfolded differently, but whether those with power should have negotiated differently. While the U.S. is often primarily blamed for the Protocol's shortcomings due to its eventual non-ratification, it initially agreed to a significant emissions reduction. Only a "small handful" of Annex I Parties shifted in a more ambitious direction during the negotiation process," with the US (0% to 7%) being [one of] the clearest cases."⁴⁶ The U.S. "agreed to a much stronger target... because almost all its demands for flexibility in the Protocol were met, the fact that Japan took on a commensurate target, and the personal conviction of Vice-President Al Gore."

What's more, the U.S. wasn't wrong in its core objection: that the agreement lacked global reach. As Bodansky himself puts it: "The problem with the Kyoto Protocol was that it covered only about a fifth of global emissions, both because the United States refused to join and because it did not address the emissions of developing countries, which by the mid-2000s accounted for a majority of global GHG

emissions.”⁴⁷ Of course, the United States is in part responsible for this. But they were not wrong in their arguments about developing countries.

Beyond this, the U.S. was instrumental in shaping Kyoto's architecture. Ambassador Eizenstat detailed these contributions in a 1998 Senate hearing: "We got sinks in, we got flexible market mechanisms in, we got our budget period in... These were all brand new concepts... These were U.S. concepts. We have now gotten countries to agree to that and we want to lock that in"⁴⁸ And those concepts remained central, even after the U.S. left. The Marrakesh Accords further cemented the U.S. vision. As Bodansky and Rajamani put it, the Accords “largely reflected the US positions,” particularly by allowing unlimited use of flexibility mechanisms and broad sink credits.⁴⁹

Today, the EU boasts global leadership in carbon markets. Its official website declares:

"Building on the EU's successful experience, the Task Force primarily aims to share the EU's lessons learned and support other jurisdictions in designing and implementing effective domestic compliance carbon pricing and carbon market instruments (such as carbon taxes or emissions trading systems)."⁵⁰

But this is a sharp turn from its original position. At the time of Kyoto, emissions trading was not just unfamiliar to many EU states - it was actively resisted. As scholars have shown, the EU's embrace of emissions trading came only after prolonged internal struggles and a strategic shift.⁵¹ Though the United States' position of the EU being clueless is obviously biased, it is supported by the EU leaders of the time emphasizing their 'learning period'.

This situation then shifts scrutiny to the European Union's negotiating stance and its role in the Kyoto dynamics. The Earth Negotiations Bulletin from COP 3 captured this interplay, reporting that "While the EU provided the ambition that drove the numerical targets of the agreed Protocol, the US played an influential role in shaping the institutional approach to implementation, notably with emissions trading." While "Celebrated by NGOs for its role, the EU stumbled a little over its own institutional clumsiness," and a key U.S. perception noted by the ENB was that the EU “[was] having more fun being green than in being practical. We had to convince everyone else.”⁵² This characterization raises questions about whether different EU actions could have fostered a more comprehensive agreement.

This reversal suggests that, if the EU eventually embraces much of the U.S negotiating positions and now champions them globally, its earlier resistance and the delay in adopting such mechanisms until after the U.S. had exited could be viewed as a strategic failure. Given the proclaimed urgency of the climate crisis, a more proactive financial commitment from the EU to secure broader developing country participation - especially when the U.S. had signed a 7% reduction target and developing nations were seeking support - might have fundamentally altered the Kyoto Protocol's trajectory. This is still obviously subject to US ratification and adherence to their Byrd-Hagel convictions. Maybe the US doesn't ratify anyway - certainly a possibility. And perhaps developing countries would have been unwilling to come to the negotiating table over this. But perhaps they had a price that the EU could have helped to pay. The Kyoto Protocol's limitations, therefore, stemmed not only from the withdrawal of a key party but also from the collective unwillingness and inconsideration of negotiating to build a truly global coalition.

Instead, the international community arguably "lost a window" for a more unified and encompassing framework. The resulting years were characterized by the United States dramatically losing support for international climate change solutions. The United States is not committed to the Paris Agreement, and a UNFCCC would seem next to impossible to ratify today. As an “alternate history,” this may not serve judgment purposes. However, as I reflected on better ways to address GHG emissions - and, as a young person, on youth strategies in global challenges - this helped me look for answers.⁵³

¹ For a brief idea of the context of these lenses please see appendix below footnotes

² Positive personal note: I realized while doing this my file management is much improved – particularly from downloading all ENB COP summary reports from COPs 1-22 (along with AGBM summary reports)

³ Working Group III Chapters 13 and 14 particularly relevant for this paper in Intergovernmental Panel on Climate Change (IPCC). (2022). Climate change 2022: Mitigation of climate change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (P. R. Shukla, J. Skea, R. Slade, A. Al Khouradajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, & J. Malley, Eds.). Cambridge University Press. <https://doi.org/10.1017/9781009157926>

⁴ Depledge, J. (2024). The future of negotiations under the climate change COP (Conference of the Parties): Implementation is not enough. *Dialogues on Climate Change*, 1(1), 12-17. <https://doi.org/10.1177/29768659241293212> (p. 12)

⁵ See “Kyoto... as an essential and valuable step towards the global (but differentiated) structure embodied at Paris” from Grubb, M. (2016). Full legal compliance with the Kyoto Protocol’s first commitment period – some lessons. *Climate Policy*, 16(6), 673–681. <https://doi.org/10.1080/14693062.2016.1194005> (p. 676) for a step in the path and “many researchers argue that the UN climate regime is broadly complete and the rulemaking phase largely over, giving way to a new era of implementation” from Depledge, 2024, p. 12 for “a conclusion in Paris”

⁶ ENB (1995). Report of the first session of the Conference of the Parties to the UN Framework Convention on Climate Change: 28 March – 7 April 1995. *Earth Negotiations Bulletin*, Vol. 12, No. 21, 10 April 1995. <https://enb.iisd.org/events/unfccc-cop-1/summary-report-28-march-7-april-1995>;

ENB (2005). Report of the eleventh session of the Conference of the Parties to the UN Framework Convention on Climate Change and first session of the Meeting of the Parties to the Kyoto Protocol: 28 November – 10 December 2005. *Earth Negotiations Bulletin*, Vol. 12, No. 291, 12 December 2005. <https://enb.iisd.org/events/unfccc-cop-11/summary-report-28-november-10-december-2005>

⁷ Depledge, J. (2005). *The organization of global negotiations: Constructing the climate change regime*. Routledge. (p. 27) I have this timeline and other period categorizations in the appendix for convenience

⁸ For a detailed and convenient timeline of the Kyoto Protocol negotiations from 1995–1997, see Depledge (2000, pp. 109–110). Full citation in appendix. Also of interest for the context of preambular language and in the structure of the treaty negotiation from this source: title alternatives, including the ‘Kyoto Protocol on Greenhouse Gas Emissions’ and the ‘Estrada Protocol’ (a main theme being the inclusion of GHGs and the difference in ‘Limitation and Reduction’ vs ‘Emissions’, seemingly in the concentration vs emissions debate) (p.13) and the description of proposal for GDP and per capita based ‘guiding objectives’ along with other proposed principles (p.100)

⁹ Bodansky, D., & Rajamani, L. (2018). The evolution and governance architecture of the United Nations climate change regime. In *The MIT Press eBooks* (pp. 13–66). <https://doi.org/10.7551/mitpress/10264.003.0004> (p. 23)

¹⁰ International Institute for Sustainable Development. (1998, November 16). *Earth Negotiations Bulletin: Summary of the Fourth Conference of the Parties to the UN Framework Convention on Climate Change (COP-4), 2–13 November 1998*. *Earth Negotiations Bulletin*, 12(97), 1–15. <https://enb.iisd.org/events/unfccc-cop-4/summary-report-2-13-november-1998>

¹¹ Bodansky & Rajamani, 2018, p. 24

¹² Hovi, J., Skodvin, T., & Aakre, S. (2013). Can climate change negotiations succeed? *Politics and Governance*, 1(2), 138–150. <https://doi.org/10.12924/pag2013.01020138> (p. 142)

¹³ Gupta, J., & van Asselt, H. (2014). Countries, coalitions, other actors and negotiation challenges. In N. K. Dubash (Ed.), *Handbook of climate change and India: Development, politics and governance* (pp. 147–172). Cambridge University Press. <https://doi.org/10.1017/CBO9781139629072.013> (p. 160)

¹⁴ Depledge, 2005, p. 173

¹⁵ See Depledge (2005) for the “ignominious collapse” of COP 6 (p. 26), which stemmed from issues “too political for the technocrats to resolve, and too technical for the politicians to understand” (Grubb & Yamin, 2001, p. 269, cited in Depledge, p. 206)

¹⁶ I am purposefully focusing on reducing GHG *emissions* in this paper, as opposed to GHG atmospheric concentrations. This is not a statement on CDR; regardless for an overview, see Intergovernmental Panel on Climate Change (IPCC). (2022). *Carbon dioxide removal (CDR)* [Fact sheet]. https://www.ipcc.ch/report/ar6/wg3/downloads/outreach/IPCC_AR6_WGIII_Factsheet_CDR.pdf

¹⁷ “The first significant conclusion is that international law matters. This will come as no surprise to international lawyers (who often offer the observation that international law is complied with almost as much as domestic law)” from (Grubb, 2016, p. 674)

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- ¹⁸ Besson, S. (2011). *Sovereignty*. In R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472>
- ¹⁹ Rajamani, L., & Peel, J. (2021). Reflections on a decade of change in international environmental law. *Cambridge International Law Journal*, 10(1), 6–31. <https://doi.org/10.4337/cilj.2021.01.01>
- ²⁰ Hey, E., & Paulini, S. (2021). *Common but differentiated responsibilities*. In R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568>
- ²¹ Bodansky, D., & van Asselt, H. (2024). *The art and craft of international environmental law* (2nd ed.). Oxford University Press. <https://doi.org/10.1093/oso/9780197672365.001.0001> (pp.134-135)
- ²² Rajamani & Peel, 2021, p. 15
- ²³ Fromageau, J., Cherkaoui, A., & Coll, R. (Eds.). (2023). *Measuring the effectiveness of environmental law through legal indicators and quality analyses* (IUCN Environmental Policy and Law Paper No. 91). IUCN. (p. 19) and (Rajamani & Peel, 2021, p. 19)
- ²⁴ Depledge, 2024, p. 13
- ²⁵ Bodansky & van Asselt, 2024, p. 30
- ²⁶ Bodansky & van Asselt, 2024, p. 256
- ²⁷ Bodansky & van Asselt, 2024, p. 219; see also Oral, N. (2022). *Climate change and protecting the oceans: A tale of two regimes*. International Union for Conservation of Nature. <https://iucn.org/sites/default/files/2022-10/nilufer-oral-climate-change-and-protecting-the-oceans-a-tale-of-two-regimes.pdf>
- ²⁸ Rajamani, L. (2024). Interpreting the Paris Agreement in its normative environment. *Current Legal Problems*, 77(1), 167–200. <https://doi.org/10.1093/clp/cuae011> (p. 168)
- ²⁹ International Union for Conservation of Nature and Natural Resources – World Commission on Environmental Law, Ocean Law Specialist Group. (2023, June 3). *Written statement: Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (Case No. 31)*. International Tribunal for the Law of the Sea, (p. 32)
- ³⁰ Bodansky & van Asselt, 2024, p. 139
- ³¹ Bodansky, D. (2016). The legal character of the Paris Agreement. *Review of European, Comparative & International Environmental Law*, 25(2), 142–150. <https://doi.org/10.1111/reel.12154> (p. 144)
- ³² Bodansky, D., & van Asselt, H. (2024). *The art and craft of international environmental law* (2nd ed.). Oxford University Press. <https://doi.org/10.1093/oso/9780197672365.001.0001> (p. 146-147)
- ³³ “Albeit in the operational part of a legally binding instrument, these provisions are best characterised as non-obligations.” From Rajamani, L. (2016). The 2015 Paris Agreement: Interplay between hard, soft and non-obligations. *Journal of Environmental Law*, 28(2), 337–358. <https://doi.org/10.1093/jel/eqw015> (p. 352)
- ³⁴ Pickering, J., McGee, J. S., Karlsson-Vinkhuyzen, S. I., & Went, J. (2019). Global climate governance between hard and soft law: Can the Paris Agreement’s ‘crème brûlée’ approach enhance ecological reflexivity? *Journal of Environmental Law*, 31(1), 1–28. <https://doi.org/10.1093/jel/eqy018>
- ³⁵ Rajamani & Peel, 2021
- ³⁶ Depledge, 2024, p. 12
- ³⁷ “Legal scholarship on the climate change problem reflects two contrasting approaches to international law - what might be called a ‘hard’ and a ‘soft’ approach. The hard approach views international law as a command backed by the threat of sanctions, while the soft approach views international law in facilitative terms, as a means of fostering greater cooperation among countries. At the risk of oversimplification, the UNFCCC reflects a soft approach to the climate change problem, the Kyoto Protocol reflects a much harder approach, and the Paris Agreement reflects a mixed approach with hard and soft elements” from (Bodansky & Rajamani, 2018, p. 32)
- ³⁸ To prove both discuss treaties, see “While we focus primarily on the hardness or softness of norms in treaties, our analysis also includes some discussion of what Chinkin refers to as ‘non-legal soft law’, which may include non-binding decisions made by the Conference of the Parties to a treaty body such as the UN climate regime.” This further implies the existence of “legal” soft law, which again shows the important distinction between definitions
- ³⁹ See footnote 28 for an example of “hard/soft approach” or Kulovesi, K., & Recio, M. E. (2023). Fighting a hard battle with a soft weapon: Is international climate change law softening? In *Law 2023* (pp. 320–336). Edward Elgar Publishing. <https://doi.org/10.4337/9781839101939.00032> (p. 328)
- ⁴⁰ It is relevant to point out that this may be more of an issue outside of legal analysis, related to the earlier confusion between legal bindingness and mandatory provisions. For an example of hard/soft law description without any specification of soft law *obligations, instruments, or provisions* as seen in legal sources, see Sabonis-Helf, T.

(2021). The Paris Accord: An experiment in polylateralism. *The Foreign Service Journal*. American Foreign Service Association. <https://afsa.org/paris-accord-experiment-polylateralism>

⁴¹ Bodansky, 2023, p. 31

⁴² Bodansky & Rajamani, 2018, p. 14

⁴³ Gupta, J. (2014). The regime under challenge: Leadership competition sets in (2001–2007). In *The history of global climate governance* (pp. 99–122). Cambridge University Press. (p. 116)

⁴⁴ Poeschel, M. (2025, April 2). *Adaptation Fund receives first new US\$13 million pledge for 2025 from Sweden, hoping to set tone for rest of year*. Adaptation Fund. <https://www.adaptation-fund.org/adaptation-fund-receives-first-new-us-13-million-pledge-for-2025-from-sweden-hoping-to-set-tone-for-rest-of-year/>

⁴⁵ Patt, A., L. Rajamani, P. Bhandari, A. Ivanova Boncheva, A. Caparrós, K. Djemouai, I. Kubota, J. Peel, A.P. Sari, D.F. Sprinz, J. Wettestad, 2022: International cooperation. In IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.016

⁴⁶ Depledge 2022, p. 683

⁴⁷ Bodansky, 2023, p. 31

⁴⁸ U.S. Senate Committee on Foreign Relations. (1998, February 11). *Implications of the Kyoto Protocol on climate change: Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Fifth Congress, second session* (S. Hrg. 105–457). U.S. Government Printing Office. <https://www.govinfo.gov/content/pkg/CHRG-105shrg46812/html/CHRG-105shrg46812.htm>

⁴⁹ Bodansky & Rajamani, 2018, p. 24

⁵⁰ European Commission. (2025). *International Carbon Pricing and Markets Diplomacy*. https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/international-carbon-pricing-and-markets-diplomacy_en

⁵¹ Kelly, G. H. (2013). Re-evaluating the Origins of the European Union’s Emissions Trading Scheme: The Europeanisation of Emissions Trading. *Journal of Sustainable Development Law and Policy*, 2(1), 83–100. <https://www.ajol.info/index.php/jsdlp/article/view/122592>. Also for following “learning period” claim.

⁵² ENB (1997). Report of the third session of the Conference of the Parties to the United Nations Framework Convention on Climate Change: 1–11 December 1997. *Earth Negotiations Bulletin*, Vol. 12, No. 76, 13 December 1997. <https://enb.iisd.org/events/unfccc-cop-3/summary-report-1-11-december-1997>

⁵³ International Union for Conservation of Nature (IUCN). (2022). *IUCN Youth Strategy 2022-2030*. <https://www.iucn.org/resources/grey-literature/iucn-youth-strategy-2022-2030>

Appendix

Further citations from footnote 1:

For the “**governance and organizational dimension**” I primarily follow:

Climate change and the future of international order. In H. W. Maull (Ed.), *The rise and decline of the post-Cold War international order* (pp. 44–63). Oxford University Press. <https://doi.org/10.1093/oso/9780198828945.003.0003>

Climate change governance: History, future, and triple-loop learning? *Wiley Interdisciplinary Reviews: Climate Change*, 7(2), 192–210. <https://doi.org/10.1002/wcc.388>

Depledge, J. (2005). *The organization of global negotiations: Constructing the climate change regime*. Routledge.

For the “**political negotiation dynamics**” I most closely follow:

Earth Negotiations Bulletin reports from UNFCCC COPs 1 through 22 (downloaded directly from IISD), alongside Depledge, J. (2022). The “top-down” Kyoto Protocol? Exploring caricature and misrepresentation in literature on global climate change governance. *International Environmental Agreements: Politics, Law and Economics*, 22(4), 673–692. <https://doi.org/10.1007/s10784-022-09580-9>

Maslin, M. A. (2021, January 25). *Short history of international climate change negotiations – From Rio to Glasgow*. UCL Global Governance Institute. <https://www.ucl.ac.uk/global-governance/news/2021/jan/short-history-international-climate-change-negotiations-rio-glasgow>

Stavins, R. N. (2023, December 15). *What really happened at COP-28 in Dubai*. An Economic View of the Environment. <http://www.robertstavinsblog.org/2023/12/15/what-really-happened-at-cop-28-in-dubai/>

- Dimitrov, R. S. (2016). The Paris Agreement on climate change: Behind closed doors. *Global Environmental Politics*, 16(3), 1–11. https://doi.org/10.1162/GLEP_a_00361
- Dimitrov, R. S. (2012). The politics of persuasion: UN climate change negotiations. In P. Dauvergne (Ed.), *Handbook of global environmental politics* (2nd ed., pp. 72–86). Edward Elgar Publishing. <https://doi.org/10.4337/9781849809412.00015>
- Kinley, R., Cutajar, M. Z., de Boer, Y., & Figueres, C. (2020). Beyond good intentions, to urgent action: Former UNFCCC leaders take stock of thirty years of international climate change negotiations. *Climate Policy*, 21(5), 593–603. <https://doi.org/10.1080/14693062.2020.1860567>

Table 3.1 *The three main phases of the climate change negotiations*

| Period | Phase and meeting held | Summary |
|-----------|--|---|
| 1995–1997 | Kyoto Protocol negotiations 1995 – COP 1; AGBM 1–2; SBSTA/SBI 1; AG13 1 1996 – COP 2; AGBM 3–5; SBSTA/SBI 2–4; AG13 2–3 1997 – COP 3; AGBM 6–8; SBSTA/SBI 5–7; AG13 4–5 | Negotiations launched by the ‘Berlin Mandate’ at COP 1 that led to the adoption of the Kyoto Protocol at COP 3. Negotiations on the Kyoto Protocol conducted in the AGBM. The SBSTA and SBI also met to develop the Convention provisions further. The ad hoc group on Article 13 (AG13) was convened to negotiate a multilateral consultative process (ultimately unsuccessfully). |
| 1998–2001 | Post-Kyoto negotiations 1998 – COP 4; SBSTA/SBI 8–9; AG13 6 1999 – COP 5; SBSTA/SBI 10–11 2000 – COP 6; SBSTA/SBI 12–13 (parts I and II). 2001 – COP 6 (part II), COP 7; SBSTA/SBI 14–15 | Negotiations on the details of the Kyoto Protocol, as well as the implementation of the Convention, based on the ‘Buenos Aires Plan of Action’ adopted at COP 4. These negotiations, conducted in the SBSTA and SBI, failed to conclude as scheduled at COP 6. COP 6 (part II) reached agreement on a political deal covering the key political issues – the ‘Bonn Agreements’. The more technical details were agreed at COP 7 in the ‘Marrakesh Accords’. |
| 2002– | Post-Marrakesh negotiations 2002 – COP 8; SBSTA/SBI 16–17 2003 – COP 9; SBSTA/SBI 18–19 | Continuing negotiations on the routine development of the Convention and Kyoto Protocol under the subsidiary bodies. |

From Depledge, J. (2005). *The organization of global negotiations: Constructing the climate change regime* (p. 27). Routledge.

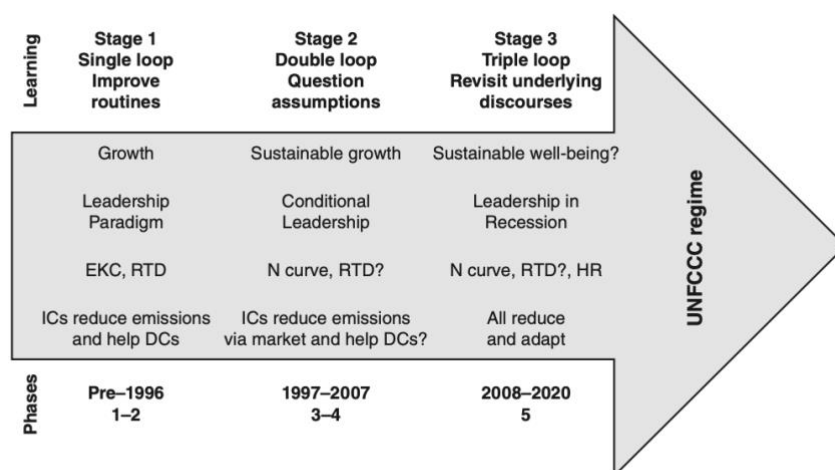


FIGURE 1 | Learning in the United Nations Framework Convention on Climate Change (UNFCCC) regime.

Reprinted from Gupta, J. (2016). Climate change governance: History, future, and triple-loop learning? *WIREs Climate Change*, 7(2), 193. <https://doi.org/10.1002/wcc.388>. © 2016 John Wiley & Sons.

A chronology of the negotiation of the Kyoto Protocol

| Date | Event |
|-------------------------|---|
| 1995 | |
| 28 March - 7 April | First session of the Conference of the Parties (COP 1) (Berlin) |
| 7 April | Decision 1/CP.1, the "Berlin Mandate", was adopted by COP 1. Ad Hoc Group on the Berlin Mandate (AGBM) was established, under the Chairmanship of Ambassador Raul Estrada Oyuela (Argentina). |
| 21-25 August | AGBM 1 (Geneva) |
| 30 October - 3 November | AGBM 2 (Geneva) |
| 1996 | |
| 5-8 March | AGBM 3 (Geneva) Informal workshops were held on QELROs and policies and measures |
| 8-19 July | Second session of the Conference of the Parties (COP 2) (Geneva) |
| 11-16 July | AGBM 4 (Geneva) Round tables were held on QELROs, policies and measures and possible impacts on developing countries of new commitments for Annex I Parties. Chairman Estrada received a mandate to prepare a "synthesis of proposals" |
| 18 July | COP 2 took note of the Geneva Ministerial Declaration |
| 9-12 December | AGBM 5 (Geneva) The synthesis of proposals (FCCC/AGBM/1996/10; dated 19 November 1996) was considered Informal consultations were held on possible impacts on developing countries of new commitments for Annex I Parties Chairman Estrada received a mandate to prepare a "framework compilation" |
| 1997 | |
| 3-7 March | AGBM 6 (Bonn) The framework compilation (FCCC/AGBM/1997/2 and Add.1; dated 3 and 26 February) was consolidated Informal consultations and a round table were held on differentiation Non-groups were convened on continuing to advance the implementation of Article 4.1 and on institutions and mechanisms Chairman Estrada received a mandate to complete the negotiating text for a protocol or another legal instrument |
| 23-24 April | Informal consultations were convened by the Government of Japan (Tokyo) |
| 1 June | Deadline for the communication of the text of any proposed amendment or protocol to the Parties by the secretariat, in accordance with Convention Articles 15 and 17. The negotiating text (FCCC/AGBM/1997/3/Add.1; dated 22 April 1997) was duly communicated to meet this deadline. |
| 16-17 June | AGBM informal consultation on strengthening the commitments in Article 4.2(a) and (b) (Bonn) |
| 12-13 July | AGBM informal consultation on continuing to advance the implementation of existing commitments in Article 4.1 (Geneva) |

| | |
|--------------------|--|
| 31 July - 7 August | AGBM 7 (Bonn) The negotiating text was debated and consolidated Non-groups were convened on QELROs, policies and measures, continuing to advance the implementation of Article 4.1, and institutions and mechanisms The outcome of the work of AGBM 7 was included in reports by the non-group Chairmen (FCCC/AGBM/1997/INF.1; dated 22 September 1997) Chairman Estrada received a mandate to prepare a Chairman's text |
| 9-10 September | Informal consultations were convened by the Government of Japan (Tokyo) |
| 8-9 October | AGBM informal consultations on the draft consolidated negotiating text by the Chairman (Bonn) |
| 22-31 October | AGBM 8, Part I (Bonn) The consolidated negotiating text by the Chairman (FCCC/AGBM/1997/7; dated 13 October 1997) was used as the basis for negotiation Non-groups were again convened on QELROs (I and II), policies and measures, continuing to advance the implementation of Article 4.1, and institutions and mechanisms The outcome of AGBM 8, Part I, was included in the revised text under negotiation |
| 8 and 9 November | Informal consultations were convened by the Government of Japan (Tokyo) |
| 30 November | AGBM 8, Part II (Kyoto) |
| 1-11 December | Third session of the Conference of the Parties (COP 3) (Kyoto) COP 3 convened a Committee of the Whole under Chairman Estrada to complete negotiations on the protocol or other legal instrument Negotiations were based initially on the revised text under negotiation (FCCC/CP/1997/2; 12 November 1997). Negotiating groups were convened on policies and measures, continuing to advance the implementation of Article 4.1, and institutions and mechanisms. Chairman Estrada took on QELROs himself. A legal drafting group was convened, along with several sub-groups to the negotiating groups |
| 7 December | Document FCCC/CP/1997/CRP.2 was issued showing the status of negotiations at the start of the high-level segment |
| 9 December | Document FCCC/CP/1997/CRP.4 was issued, including proposed targets for Annex I Parties |
| 10 December | Document FCCC/CP/1997/CRP.6 was issued for consideration at the final CoW plenary meeting |
| 10-15, 11 December | The CoW unanimously recommended the Kyoto Protocol to the United Nations Framework Convention on Climate Change for adoption by the COP |
| 13-15, 11 December | COP 3 adopted the Kyoto Protocol to the United Nations Framework Convention on Climate Change by consensus (FCCC/CP/1997/L.7/Add.1). COP 3 also adopted accompanying decisions 1/CP.3 (adoption of the protocol), 2/CP.3 (methodological issues) and 3/CP.3 (implementation of Article 4.8 and 4.9 of the Convention) |
| 1998 | |
| 16 March 1998 | Kyoto Protocol was opened for signature at United Nations Headquarters in New York. The authentic text is contained in FCCC/CP/1997/7/Add.1 |

Depledge, J. (2000). *Tracing the origins of the Kyoto Protocol: An article-by-article textual history* (Technical paper prepared under contract to the UNFCCC). United Nations Framework Convention on Climate Change. <https://unfccc.int/documents/1880>

- 1990 *Second World Climate Conference* concludes that countries need to stabilize GHG emissions and that developed countries should establish emissions targets and/or national programs or strategies.
- 1990 *UN General Assembly* establishes the INC to negotiate a climate change convention.
- 1992 INC adopts UNFCCC, which is opened for signature at Rio Summit.
- 1994 UNFCCC enters into force.
- 1995 COP 1 adopts Berlin Mandate authorizing negotiations to strengthen UNFCCC commitments.
- 1997 COP 3 adopts Kyoto Protocol, establishing quantitative limits on greenhouse gas emissions by industrialized countries.
- 2001 COP 7 adopts Marrakesh Accords, spelling out the detailed rules for the Kyoto Protocol.
- 2004 Kyoto Protocol enters into force.
- 2005 CMP 1 launches negotiations toward a second commitment period for Kyoto.
- 2007 COP 13 adopts the Bali Action Plan, initiating a new round of negotiations under the UNFCCC.
- 2009 COP 15 takes note of the Copenhagen Accord, establishing a new architecture, based on voluntary mitigation pledges and transparency.

Bodansky, D., & Rajamani, L. (2018). The evolution and governance architecture of the United Nations climate change regime. In U. Luterbacher & D. F. Sprinz (Eds.), *Global climate policy: Actors, concepts, and enduring challenges* (pp. 17–40). MIT Press. <https://doi.org/10.7551/mitpress/10264.003.0004> (p. 19)